

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1942-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOMINGO S. HERNANDEZ,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Domingo S. Hernandez appeals from a judgment convicting him of four counts of first-degree sexual assault in violation of § 948.02(1), STATS., and from an order denying his postconviction motions. In his postconviction motions, Hernandez moved for a new trial due to ineffective assistance of counsel and a new sentencing hearing due to insufficient time to review his presentence investigation (PSI) and inaccurate information contained

within the PSI. We conclude that Hernandez's trial counsel was not ineffective and a new sentencing hearing is not required. Therefore, we affirm.

An information charged Hernandez with three counts of sexual contact with one individual under the age of thirteen and one count of sexual contact with another individual under the age of thirteen. The two victims testified for the State, as did the grandmother of one of the victims, who had rented a room to Hernandez. Hernandez testified and denied having sexual contact with either victim.

To succeed on a claim of ineffective assistance of counsel, Hernandez must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a strong presumption that the attorney has rendered effective assistance and made all significant decisions exercising reasonable professional judgment. *Id.* at 689. In addition, Hernandez must show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694; *State v. Sanchez*, ___ Wis.2d ___, 548 N.W.2d 69 (1996). Ineffective assistance of counsel claims present mixed questions of law and fact. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). The trial court's findings of fact will not be disturbed unless clearly erroneous. *Id.* at 634, 369 N.W.2d at 714-15. However, the determinations of whether counsel's performance was deficient and whether the defendant was prejudiced are questions of law, which we review de novo. *Id.*

Hernandez's first claim is that his trial counsel provided ineffective assistance on a number of grounds. The trial court found that counsel's performance was not deficient and that there was no prejudice. We do not decide whether counsel's performance was deficient because we conclude Hernandez has not shown prejudice as a result of the claimed deficiencies. See *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990) (reviewing court may dispose of ineffective assistance claim on either ground).

Hernandez contends that trial counsel did not properly prepare him for trial. According to Hernandez, he and his counsel met only three times prior to trial and that was not sufficient. However, Hernandez has not

provided any basis for his claim that additional meetings with trial counsel would have benefitted him. He does not explain how additional preparation would have made him a more credible witness and there is no indication that Hernandez misunderstood key questions, testified inaccurately, or forgot critical evidence.

Hernandez also contends that trial counsel did not discuss with him his right to remain silent. Trial counsel testified that he did not have a specific memory of discussing this right with Hernandez. However, he also testified that he believed he did discuss with Hernandez strategy considerations with regard to whether he should testify. In trial counsel's view, it was necessary for Hernandez to testify because there was no other evidence or person to contradict the complaining witnesses, and he believed he discussed this with Hernandez. Hernandez has not made any showing that he would be in a better position had he remained silent.

Hernandez's next contention is that he was not provided with a copy of the transcript from the preliminary examination. Trial counsel testified that although he did not recall whether or not he gave Hernandez a copy, it was his practice to do so. Even if we assume for purposes of argument that trial counsel did not give Hernandez a copy, Hernandez has not demonstrated how his inability to review the transcript had any effect on the outcome of the trial.

Hernandez contends that trial counsel refused to investigate and locate additional witnesses who would have testified to his social activities with the victims. However, he must make a showing that the witnesses would have testified in his favor. See *Jandrt v. State*, 43 Wis.2d 497, 505-06, 168 N.W.2d 602, 607 (1969). He has not done this.

Hernandez argues that counsel should have pursued discovery of certain medical records. He has provided no factual basis from which to conclude that the pursuit of these records would have produced evidence favorable to him. Trial counsel testified that he did not call Dr. Catherine Henry because Dr. Henry had formed the opinion that one of the victims had been sexually assaulted and that there was objective evidence of assault despite the lack of any dramatic anal injury.

Concerning Hernandez's contention that counsel did not challenge two jurors for cause, the trial court stated it would not have granted such a motion because both jurors agreed that they could decide the issues based upon the evidence presented at trial without being influenced by their personal experiences. It would have been within the trial court's discretion to refuse to dismiss for cause based on the jurors' responses. Hernandez was not prejudiced by counsel's failure to bring such a motion.

Finally, Hernandez contends that counsel should have requested an instruction or response to the jury's questions relating to the timing and locality of the arrest. Because the trial court properly concluded it should not answer these questions, a request by counsel for instructions or a response would have lacked merit. Trial counsel's failure to pursue a course of action that lacks merit does not show prejudice. See *State v. Hoffman*, 163 Wis.2d 752, 763, 472 N.W.2d 558, 562-63 (Ct. App. 1991).

Hernandez's second claim is that he is entitled to a new sentencing hearing because he did not have adequate time to review his PSI, and because there are various inaccuracies in the PSI. The court sentenced Hernandez to six years on each of the first three counts, to be served consecutively, and probation for twenty years on the fourth count, to run concurrent to his prison term. Hernandez testified on direct examination at the postconviction hearing that he had only about five minutes to review the PSI prior to sentencing, and that with more time to review it since sentencing, he has found errors.

A criminal defendant has a due process right to review his presentence investigation report. *State v. Skaff*, 152 Wis.2d 48, 53, 447 N.W.2d 84, 86 (Ct. App. 1989). However, there is no due process violation unless the court had a blanket policy of withholding PSIs from defendants. *State v. Littrup*, 164 Wis.2d 120, 128 n.3, 473 N.W.2d 164, 167 (Ct. App. 1991).

At sentencing, the court asked Hernandez if he had reviewed the presentence report and also if he needed additional time to review it. Hernandez stated that he had reviewed it, and did not wish for additional time. During cross examination at the postconviction hearing, Hernandez conceded that he may have had fifteen or twenty minutes to review the presentence investigation. Although the court did not expressly make a finding that

Hernandez had adequate opportunity to review the report, the record supports this implicit finding. See *Moonen v. Moonen*, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968) (this court may affirm the trial court if it reached a result that evidence would sustain had a specific finding been made).

Hernandez has a due process right to be sentenced on the basis of accurate information. *State v. Coolidge*, 173 Wis.2d 783, 788, 496 N.W.2d 701, 705 (Ct. App. 1993). However, he also has the burden of proving by clear and convincing evidence that the evidence relied upon by the trial court was inaccurate and that he was prejudiced by any reliance. *Littrup*, 164 Wis.2d at 132, 473 N.W.2d at 168.

The claimed inaccuracies related to the characterization of Hernandez's employment history, the frequency of the uncharged assaults, how the assaults were reported, and a report that he left the jurisdiction. The trial court found that even if the claimed inaccuracies were proved, that would not change the sentence the court imposed. The court at sentencing described the crimes as "violent," "devious," "very intrusive" and "very invasive." Specifically, both victims testified that Hernandez had fingered their vaginas; one victim testified he had also licked her vagina and penetrated her anus. The court's determination that Hernandez was not prejudiced by any inaccuracies in the sentencing report is supported by the record.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.